No. _____

In the
Supreme Court of the United States

CeCee C. Kane and Joseph P. Kane,
Petitioners,

v.

Sulzer Settlement Trust,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, upon motion by an aggrieved class member, the District Court is required to review the legal conclusions of a "Special Master" which operate to exclude otherwise deserving class members from the settlement created for their benefit?

PARTIES TO PROCEEDING

Petitioners Kane are members of the certified class in In Re: Sulzer Orthopedics and Knee Prosthesis Products Liability Litigation (United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:01-CV-0900, who have been excluded from the Sulzer class action settlement by order of the "Special Master" without judicial review.

Respondent is the Sulzer Settlement Trust which was created to administer the settlement between class members and Sulzer Orthopedics, Inc., in a case arising out of allegedly defective hip replacement components.

In addition to these parties, the following were parties to the proceeding below:

Plaintiffs: Shirley Butler and Linda Mediate, both individual members of the certified class were excluded from participating in the class action settlement agreement by order of the "Special Master" without judicial review.

Defendants: Sulzer Orthopedics, Inc., is a publicly owned cooperation. In May of 2003, Zimmer Holdings, Inc., which is a publicly owned company traded on the New York Stock Exchange acquired CenterPulse, Inc., whose subsidiaries include CenterPulse Orthopedics, Inc., formerly known as Sulzer Orthopedics, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

FEDERAL RULES OF CIVIL PROCEDURE:

PETITION FOR WRIT OF CERTIORARI

Petitioners CeCee and Joseph Kane respectfully petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (App. 1a) and May 7, 2005 (App. 2a).

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005, is published at 398 F. 3d. 782 (6th Cir. 2005) and attached hereto (App. 1a.). The Order of the United States Court of Appeals for the Sixth Circuit, filed May 7, 2005, is also attached hereto (App. 2a). The underlying decision of the United States District Court for the Northern District of Ohio, Eastern Division, filed on February 6, 2004, may be accessed at that Court's Pacer site at https://ecf.ohnd.uscourts.gov/cgi-bin.pl. The case number is 1:01-CV-0900. The docket document number is 1714.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order denying Rehearing En Banc on May 7, 2004 (App. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. 53(e)(4)[1] reads as follows: "**Stipulation as to Findings**": The effect of a masters report is the same whether or not the parties have consented to a reference; but, when the parties stipulate that a masters' findings of fact shall be final, *only questions of law arising upon the report shall thereafter be considered.* (emphasis added)[2]. Also Fed.R.Civ.P. 23 is relevant to the extent that it imposes upon the District Court an equitable and fiduciary duty to protect class members.

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[1] Rule 53 was revised effective December 1, 2003. Unless otherwise provided, citations are to the older versions (App. 2a).

[2] Section (g)(4) of the current version of Rule 53, in effect since December 1, 2003, reads as follows: "**Legal Conclusions**: The court *must* decide de novo all objections to conclusions of law made or recommended by a master." (emphasis added)

STATEMENT OF THE CASE

INTRODUCTION

Petitioners Kane respectfully petition this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (398 F.3d 782 (6th Cir. 2005) (App. 1a) and that Court's later Order denying the Kane Petition for Rehearing En Banc, filed on May 7, 2005. These decisions involve an issue of exceptional importance in the future administration of class action settlement agreements nationwide: the reviewability of legal determinations on ultimate issues by decision makers specifically designated as "Special Masters" in class action settlement agreement but without reference to Rule 53. The above re-formatted decisions of the Sixth Circuit are in direct conflict with *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984), as discussed herein.

Petitioners further contend that the Sixth Circuit's decision of February 22, 2005 erroneously affirmed the District Court's total abdication of its equitable and fiduciary duty to protect deserving class members from arbitrary exclusion from class action settlemems under Fed.R.Civ.P. 23. Such affirmance is in direct conflict with the decisions of multiple circuits holding that the determination of whether to allow participation of late claimants in a class action is essentially an equitable decision within the discretion of the Court. *In re: Crazy Eddie Sec. Litig.,* 906 F. Supp. 840, 843 (E.D.N.Y. 1995)(citing *Zients v. LaMorte,* 459 F.2d 628, 629-30 (2nd Cir. 1972). See, also, *In re: Orthopedic Bone Screw Products Liability Litigation,* 246 F. 3d 215, 316-17 (3rd Cir. 2001). The Sixth Circuit's extraordinary decision to allow the District Court to avoid its equitable and moral

responsibility to protect deserving class members by refusing to interpret and enforce the terms of the Sulzer Class Action Settlement Agreement (CASA)[3] despite the explicit "ability" to do so granted at CASA § 9.1 is legally and morally indefensible.

FACTS

Petitioner CeCee C. Kane was implanted with defective Sulzer products on two separate occasions involving the same hip over the course of two years. Both products failed. She has undergone eight surgeries and remains confined to a wheelchair. Prior to adoption of the CASA, Sulzer paid Mrs. Kane more than $30,000.00 in recognition of their culpability and her severe injuries. Mrs. Kane opted into the CASA, and the claims administrator was informed of Sulzer's prior payments to Mrs. Kane within weeks of the approval of the CASA pursuant to Claims Administrator's Procedural (CAP) rule 7.2 (CAP 7.2)[4]. Mrs. Kane missed an Orange Form (i.e., registration) deadline due to circumstances beyond her control, when physicians failed to complete lengthy claim forms and declarations prior to the deadline. All of her forms, however, were provided to the claims administrator *months* before any action would have been taken on her claim. The claims administrator summarily dismissed her claim. The Special Master affirmed (App. 3a). Mrs. Kane, relying on Rule 53, then attempted to appeal to the District Court (PACER, N. Dist. Ohio, case no.: 1:01-CV-

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[3] The CASA can be viewed in its entirety at the web page for the Sulzer Settlement Trust at http://sulzerimplantsettlement.com/classactionsettlement.htm.

[4] The Claims Administrator's Procedural rules (CAP) can also be accessed at the Sulzer Settlement Trust at https://sulzerimplantsettlement.com

0900, doc. no. 1179 and 1180). The District Court refused to review the Special Master Determination claiming a lack of jurisdiction. In essence, the District Court ruled that it had no jurisdiction to review the legal conclusions of "Special Master" because the CASA document contained no provision authorizing such review (PACER, N. Dist. Ohio, no. 1:01-CV-0900, docket. no.: 1714)[5]. In its decision of February 22, 2005, the United States District Court for the Sixth Circuit affirmed (App. 1a). In its Order of May 7, 2005, the District Court denied the Kane Petition for Rehearing En Banc (App. 2a).

REASONS FOR GRANTING THE WRIT

Petitioners Kane direct the Court's attention to *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984), a case that is directly on point and directly in conflict with the Sixth Circuit's decision of February 22, 2005. In *Turner*, the District Court tried unsuccessfully to abdicate its equitable responsibility to protect class members by characterizing a "special master" as a quasi-arbitrator not subject to judicial review, which is precisely what occurred in this case. The Eleventh Circuit refused to allow the District Court to punt. It held that the name "Special Master" was a legal term under Rule 53, and that if a class action decision maker is repeatedly referred to as a "Special Master" in the agreement and elsewhere, he is a Rule 53 Special Master. A Rule 53 Special Master's legal decisions are *always* advisory and subject to District Court review. *Turner*, 722 F.2d at 664-665. (emphasis added); see, also, *United States v. Microsoft Corp.*, 147 F.3d 935, 955 (D.C. Cir. 1998); *Baker Industries, Inc. v. Cerberus Limited*

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[5] As noted above, the District Court opinion can be accessed at https://ecf.ohno.uscourts.gov/cgi-bin.pl.

Cravath, 764 F.2d 204 *. (3d Cir. 1985), dissent, J. Higginbotham. Here, the CASA refers repeatedly to a "Special Master". There is no mention whatsoever of arbitration or waiver of Rule 53 judicial review.

There is no question that the "Special Master" in this case was a *Rule 53 Special Master* under *Turner*, and that the District Court had an obligation under Rule 53 to review his legal determinations. Petitioners Kane have never "attacked" the terms of the CASA or requested that the District Court or this Court "alter" the terms of the CASA. On the contrary, the Kanes merely requested that the District Court interpret the CASA as it was specifically authorized to do. See, CASA § 9.1. The District Court *misinterpreted* the CASA, first, by mischaracterizing the Special Master as some kind of arbitrator, and second, by misinterpreting the phrase "final and binding" as precluding judicial review of legal conclusions. In reality, the phrase merely terminates the administrative process and makes a Special Master Determination ripe for appeal to the District Court.

Interpretation is not alteration or attack. When a District Court engages in the interpretation of a class action settlement agreement, it must construe the agreement *against* those who seek to restrict class members from pursuing individual claims. See, *In re: Diet Drugs Prod. Liab. Litig.*, 369 F.3d 293, 308 (3d Cir 2004). The District Court had the ability (i.e., jurisdiction) to *interpret/enforce* the CASA and the responsibility to do it in a manner consistent with the *equitable* nature of the proceeding. The District Court, however, did nothing, and the Sixth Circuit affirmed.

The phrase "final and binding" (CASA § 4.6(g)), standing alone, is not enough to waive appellate rights. Without language establishing an *express* waiver of appellant's rights, there is no waiver. See, *In re: Dept. Energy Stripper Well Exemption Litig.*, 853 F.2d 1579, 1582